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Supreme Court No. _____
COA No. 56935-0-I

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

STATE OF WASHINGTON,

Respondent,

v.

TIMOTHY E. PUGH,

Appellant.

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER/DECISION BELOW

Timothy Pugh requests this Court grant review pursuant to RAP 13.4 of the unpublished decision of the Court of Appeals in State v. Pugh, No. 56935-0-I, filed July 30, 2007. A copy of the Court of Appeals opinion is attached to this petition as an appendix.

B. ISSUES PRESENTED FOR REVIEW

1. Whether, according to the criteria set forth in State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986), article I, section 22 of the Washington Constitution grants broader protection than the Sixth Amendment in the context of hearsay statements admitted under the excited utterance exception to the hearsay rule, where there is no opportunity for cross-examination.

2. Whether Bridgette Pugh's hearsay statements to the 911 operator were testimonial under the Sixth Amendment and thus inadmissible without an opportunity for cross-examination.

C. STATEMENT OF THE CASE

The following statement of the case is taken from the Court of Appeals opinion, Slip Op. at 2-3. Timothy and Bridgette Pugh are married. In November 2004, Ms. Pugh received a protection order against Mr. Pugh issued by the SeaTac Municipal Court. In the early hours of March 31, 2005, Ms. Pugh called 911 stating "My

husband was beating me up really bad." She reported pain in her face and requested an ambulance. When the police arrived, Ms. Pugh had a bruised face and chipped tooth. The police quickly arrested Mr. Pugh in the parking lot outside the apartment. Because he allegedly assaulted Ms. Pugh while she was under a protection order, he was charged with one count of domestic violence felony violation of a court order. Following his arrest, Mr. Pugh made several phone calls from the King County Jail to his wife in further violation of the court order. He was charged with two misdemeanor violations as a result of the calls. In addition, the telephone calls were monitored and recorded by the jail. The State obtained a copy of the calls and charged Mr. Pugh with an additional count of witness tampering because he allegedly induced his wife to testify falsely or withhold testimony or absent herself from the proceedings against him.

The trial court granted the defense motion to sever the felony no-contact order violation from the other counts. The misdemeanor and witness tampering trial was held first, and Mr. Pugh was convicted of those three counts. The State served a subpoena on Ms. Pugh but she failed to appear at either trial. At the felony no-contact violation trial, the court admitted a recording

of Ms. Pugh's 911 phone call as an excited utterance under ER 803(a)(2), although Mr. Pugh had no opportunity to cross-examine Ms. Pugh regarding those statements. Mr. Pugh was convicted of that count as well.

On appeal, Mr. Pugh argued his right to confront the witnesses against him guaranteed by both the federal and state constitutions was violated when the trial court admitted Ms. Pugh's hearsay statements to the 911 operator, as Mr. Pugh had no opportunity to cross-examine Ms. Pugh. Mr. Pugh addressed the issue separately under the Sixth Amendment and article I, section 22 of the Washington Constitution, providing a full Gunwall[1] analysis of his rights under article I, section 22 in the context of the excited utterance hearsay exception. In addition, Mr. Pugh argued his constitutional right to notice of the charges against him was violated when the jury was instructed on an alternative statutory means of committing the crime of witness tampering that was not alleged in the information.

The Court of Appeals agreed with Mr. Pugh that his constitutional right to notice of the charges was violated when the jury received instructions containing all three statutory means of

[1] State v. Gunwall, 106 Wn.2d 54, 61-63, 720 P.2d 808 (1986).

committing witness tampering, as the information charged Mr. Pugh with only two of the alternatives. Slip Op. at 4. Finding that the error was neither invited nor harmless, the court reversed the conviction for witness tampering.[2] Slip Op. at 4-5.

The Court of Appeals did not agree, however, that Mr. Pugh's constitutional right to confrontation was violated when the trial court admitted Ms. Pugh's hearsay statements to the 911 operator without an opportunity for cross-examination. Slip Op. at 5-14. The court found Mr. Pugh's Gunwall analysis was sufficient to permit an independent analysis of his rights under the state constitution, but concluded the Gunwall analysis failed to show broader protections in this context. Slip Op. at 9. Thus, the Court of Appeals affirmed the conviction for felony violation of a no-contact order. Slip Op. at 15.

The additional facts as set forth in the parties' pleadings and the Court of Appeals opinion are incorporated herein by this reference.

[2] Mr. Pugh does not challenge this conclusion of the Court of Appeals, and the conviction for witness tampering is not at issue in this petition.

D. ARGUMENT WHY REVIEW SHOULD BE GRANTED

1. WHETHER ARTICLE I, SECTION 22 OF THE WASHINGTON CONSTITUTION PROVIDES BROADER PROTECTION THAN THE SIXTH AMENDMENT TO PRECLUDE ADMISSION OF THE 911 CALL ABSENT AN OPPORTUNITY FOR CROSS-EXAMINATION, PRESENTS A SIGNIFICANT QUESTION OF WASHINGTON CONSTITUTIONAL LAW AND IS AN ISSUE OF SUBSTANTIAL PUBLIC INTEREST

As discussed below, in numerous cases involving the admission of hearsay statements under the excited utterance exception, Washington courts have recognized that article I, section 22 potentially provides a broader right to confrontation than the Sixth Amendment. Despite this recognition, however, courts have declined to address the parameters of the state constitutional right, as the parties in those cases did not provide adequate analyses using the Gunwall factors. In this case, by contrast, the Court of Appeals concluded Mr. Pugh's Gunwall analysis was sufficient to permit an independent analysis of his rights under the state constitution. Thus, the Court of Appeals opinion as well as Mr. Pugh's Gunwall analysis provide an adequate basis for this Court finally to address whether article I, section 22 provides broader protection in this context.

The number of cases that have noted the potentially broader protections of the state constitutional right to confrontation, but have failed to grant any broader protection due to inadequate briefing, suggest the need for guidance from this Court regarding the nature and extent of the state constitutional right. Moreover, because the Court of Appeals opinion in this case is unpublished, it cannot provide that needed guidance. Thus, review is warranted, as this case involves a significant question of state constitutional law that has substantial public importance. RAP 13.4(b)(3), (4).

a. The numerous cases that have recognized but failed to address the potentially broader protections of article I, section 22 in the context of admission of hearsay statements under the excited utterance exception, suggest a need for guidance from this Court. Article 1, section 22 of the Washington State Constitution provides, "in criminal prosecutions the accused shall have the right to . . . meet the witnesses against him face to face."

In State v. Foster, 135 Wn.2d 441, 957 P.2d 712 (1998), five members of this Court concluded that article 1, section 22 must be interpreted independently from the Sixth Amendment. Id. at 473-74 (Alexander, J., concurring in part, dissenting in part); Id. at 481-94 (Johnson, J., dissenting). The Foster Court analyzed whether

RCW 9A.44.150, which permits a child victim to testify via closed-circuit television in certain situations, violated either the federal or state confrontation clauses. The five justices agreed the Washington Constitution provides a broader right to face-to-face confrontation than that guaranteed by the Sixth Amendment. Id.

This Court requires a party advocating a broader interpretation of a state constitutional provision to provide an analysis that applies the Gunwall factors to the particular situation presented by the case.[3] State v. Smith, 148 Wn.2d 122, 131, 59 P.3d 74 (2002). Although the Smith court recognized it had earlier concluded in Foster that article 1, section 22 provides greater protection than the Sixth Amendment, the court declined to analyze the Washington Constitution separately, as the defendant had not applied the Gunwall factors to the particular situation presented by the case. Id. at 131.

The issue in this case is whether Mr. Pugh's state constitutional right to confrontation was violated when the trial court admitted the complaining witness's hearsay statements to the 911

[3] In Gunwall, the court set forth six factors to consider in determining whether a state constitutional provision affords greater protection than its federal counterpart. The six factors are: (1) the textual language of the state constitution; (2) significant differences in the texts of parallel provisions of the federal and state constitutions; (3) state constitutional and common law history; (4) preexisting state law; (5) differences in structure between the federal and

operator under the excited utterance exception to the hearsay rule, where Mr. Pugh had no opportunity to cross-examine the witness, and where there was no showing the witness was unavailable to testify.

In numerous cases, courts have recognized that article I, section 22 provides potentially broader protection in this context, yet the courts in those cases did not separately analyze the state constitutional right, as the issue was not adequately briefed. In State v. Palomo, for instance, this Court held the State need not demonstrate the declarant's unavailability in order to offer out-of-court statements under the hearsay exception for excited utterances. 113 Wn.2d 789, 797, 783 P.2d 575 (1989). Although the Palomo Court recognized the language of article I, section 22 is different from the Sixth Amendment and arguably grants broader protection, the Court declined to analyze the state provision separately, as it had not been briefed. Id. at 794.

More recently, in State v. Ohlson, __ Wn.2d __, 2007 Wash. LEXIS 791 (No. 78238-5, Oct. 18, 2007), this Court addressed the admissibility of excited utterance hearsay statements under the Sixth Amendment where the declarant did not testify. Again, this

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state constitutions; and (6) matters of particular state interest or local concern. Gunwall, 106 Wn.2d at 61-62.

Court noted the separate protections provided by article I, section 22, but because Ohlson made no arguments based on the state constitution, this Court declined to address the issue. Id. at *9 n.1 (citing State v. Wheeler, 145 Wn.2d 116, 124, 34 P.3d 799 (2001) (declining to address potential claim under state constitution where parties failed to argue or brief the issues)).

The Court of Appeals has similarly declined to address the parameters of the state constitutional right to confrontation in factual contexts similar to the one present in this case, due to inadequate briefing and argument. See State v. Saunders, 132 Wn. App. 592, 606-07, 132 P.3d 743 (2006), rev. denied, 159 Wn.2d 1017 (2007) (admissibility of excited utterance hearsay statements to 911 operator); State v. Mohamed, 132 Wn. App. 58, 69, 130 P.3d 401 (2006), rev. denied, 149 P.3d 379 (2006) (same). As the Court of Appeals recognized in Saunders, to date, no Washington case has analyzed article 1, section 22 independently in the type of factual context presented in this case, in Saunders, and in countless other cases. 132 Wn. App. at 605.

As these cases demonstrate, there is a complete absence of case law to guide courts in determining the nature and extent of the state constitutional right to confrontation in the context of the

excited utterance hearsay exception. Moreover, the frequency with which that hearsay exception is applied suggests the need for such guidance from this Court. Finally, if the Washington Constitution indeed provides broader protection, that protection should not be withheld from criminal defendants. For these reasons, this Court should accept review of Mr. Pugh's case and address the application of article I, section 22 in this context.

b. Article I, section 22 provides broader protections than the Sixth Amendment in this case. The Court of Appeals addressed but rejected Mr. Pugh's argument that the Washington Constitution provides broader protections in his case. The court addressed only Gunwall factor number four, preexisting Washington case law, and concluded that early courts would have admitted excited utterances even when the witness was not shown to be unavailable. Slip Op. at 9. The Court of Appeals decision should be reversed, as the court erroneously equated the scope of the modern-day excited utterance exception with the age-old *res gestae* hearsay exception.

The State's case against Mr. Pugh depended upon hearsay statements introduced under the hearsay exception for excited utterances. ER 803(a)(2). A prosecution on this basis was

unknown in early Washington law as this hearsay exception did not exist at the time of the passage of the Washington Constitution.

The Court of Appeals acknowledged the modern excited utterance exception did not exist at the time of the founding, but concluded that because it evolved from the *res gestae* exception, it is virtually coterminous with that exception. Slip Op. at 10, 13. But Washington courts openly acknowledge the state's modern excited utterance rule "is not as restrictive as the requirements of the common law [*res gestae*] exception." State v. Dixon, 37 Wn. App. 867, 871-72, 684 P.2d 725 (1984).

A *res gestae* declaration differs from an excited utterance in that it is not a narrative description of a past event. A *res gestae* statement is one that is "of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event." Beck v. Dye, 200 Wash. 1, 10-11, 92 P.2d 1113 (1939).

The *res gestae* exception, as set forth in Beck, is the common law forerunner of the exception for present sense impressions, not excited utterances. 5B Karl B. Tegland, Washington Practice: Evidence Law and Practice § 803.5, at 418 n.1 (1999). The exception for present sense impressions provides:

"A statement describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter" is not excluded by the hearsay rule even though the declarant is available as a witness. ER 803(a)(1). The time limit is considerably shorter than the time limit associated with the exception for excited utterances. Tegland, §803.4, at 417.

As stated in Beck, statements of present sense impression or *res gestae* must grow out of the event reported and in some way characterize that event. 200 Wash. at 9-10. The statement must be made "while" the declarant was perceiving the event or condition, or "immediately thereafter." ER 803(a)(1). It must be a "spontaneous or instinctive utterance of thought," evoked by the occurrence itself, unembellished by premeditation, reflection, or design. Beck, 200 Wash. at 9-10. Thus, a statement in response to a question cannot qualify as a present sense impression. State v. Martinez, 105 Wn. App. 775, 782, 20 P.3d 1062 (2001), overruled on other grounds, 119 Wn. App. 494, 81 P.3d 157 (2003). In other words, statements made in response to a 911 operator's questioning cannot qualify as present sense impressions and would not fall under the traditional exception for *res gestae*.

In contrast, to be admissible as an excited utterance, the statement need not be contemporaneous with the startling event. To the contrary, Washington cases have held admissible excited utterances made even *several hours* after the startling event. See, e.g., State v. Strauss, 119 Wn.2d 401, 416-17, 832 P.2d 78 (1992) (rape victim's description of incident to police up to 3 1/2 hours after startling event held admissible as excited utterance); State v. Hieb, 39 Wn. App. 273, 278-79, 693 P.2d 145 (1984), rev'd on other grounds, 107 Wn.2d 97, 727 P.2d 239 (1986) (description of alleged event by witness made several hours after incident and in response to questions not admissible as present sense impression but admissible as excited utterance); State v. Fleming, 27 Wn. App. 952, 956, 958, 621 P.2d 779 (1980) (rape victim's statements to friend three hours after incident and statements to police three to six hours after incident admissible as excited utterances).

Washington courts at the time of the adoption of the Washington Constitution and well afterward rigorously enforced the requirement that a statement was admissible only if it was part of, rather than a description of, an event. In 1898, for example, this Court addressed a prosecution for the rape of a child where the child's mother testified to her child's statements and condition

immediately after the assault. State v. Hunter, 18 Wash. 670, 52 Pac. 247 (1898). After examining cases from various jurisdictions, the court held there was no error because the evidence was restricted to the condition of the child's clothing and the "fact of the complaint," and not to the particulars of the complaint. 18 Wash. at 672. The court warned, "anything beyond that is hearsay of the most dangerous character." Id.

Thus, the rule around the time of the founding of the Washington Constitution was that a spontaneous declaration might be admissible in a criminal case if it was part of the *res gestae*, that is, an inseparable part of the event itself. But, save the exception for dying declarations, statements describing a completed criminal act were considered inadmissible hearsay if the declarant did not testify at trial. Moreover, in State v. Eddon, 8 Wash. at 302, the Court held it was error to instruct the jury to give a dying declaration the same weight as other sworn testimony. This powerfully suggests the founding fathers and courts originally conceived the state right to confrontation as precluding the admission of such accusatory evidence as a substitute for live trial testimony in an adversarial setting.

Finally, the Court of Appeals concluded that because early cases generally did not mention the need to prove the witness's unavailability before hearsay statements describing a past event could be admitted, there was no such requirement. Slip Op. at 13. But early Washington cases generally admitted such hearsay statements only if the witness was unavailable. See, e.g., Eddon, 8 Wash. 292 (dying declaration admissible because witness unavailable). A recent decision from this Court suggests the state constitution requires a more stringent adherence to this traditional requirement of unavailability than under the Sixth Amendment. In State v. Shafer, 156 Wn.2d 381, 128 P.3d 87 (2006), the Court addressed the admission of a child's hearsay statements under RCW 9A.44.120. The Court held RCW 9A.44.120 does not offend article 1, section 22. Id. at 391 (citing State v. Ryan, 103 Wn.2d 165, 169-70, 691 P.2d 197 (1984)). In Ryan, the Court had earlier held child hearsay statements under the statute "comport with the general approach utilized to test hearsay against confrontation guaranties." 103 Wn.2d at 170. That was because the statute requires a determination that the statements are reliable and additionally "requires the child to testify at the proceedings, or to be

unavailable, and does not alter the necessary showing of unavailability." Id. at 170.

2. WHETHER MR. PUGH'S RIGHT TO CONFRONTATION WAS VIOLATED PRESENTS A SIGNIFICANT QUESTION OF LAW UNDER THE SIXTH AMENDMENT

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." The admission of "testimonial" hearsay statements without an opportunity to cross-examine the declarant violates the Sixth Amendment. Crawford v. Washington, 541 U.S. 36, 68-69, 124 S.Ct. 1354, 158 L.Ed.2d 177 (2004).

In Davis v. Washington, __ U.S. __, 126 S.Ct. 2266, 2273-74, 165 L.Ed.2d 224 (2006), the Supreme Court set forth the following test to determine whether a given hearsay statement is testimonial:

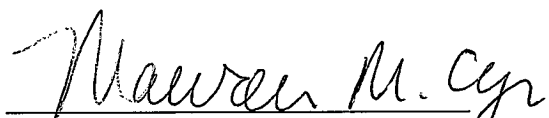
> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Applying that test to the hearsay statements in this case, this Court must conclude Ms. Pugh's statements to the 911 operator were testimonial and should not have been admitted without an opportunity for cross-examination.

E. CONCLUSION

Because this case presents a significant question of state constitutional law that has substantial public importance, this Court should accept review. RAP 13.4(b)(3), (4).

Respectfully submitted this 25th day of October 2007.



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APPENDIX

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

STATE OF WASHINGTON, Respondent, v. TIMOTHY EARL PUGH, Appellant.	No. 56935-0-I **DIVISION ONE** UNPUBLISHED OPINION FILED: July 30, 2007

APPELWICK, C.J. – Timothy Pugh was charged with felony violation of a no-contact order, two misdemeanor violations of a no-contact order and witness tampering stemming from events involving his wife, Bridgette Pugh. The felony no-contact charge was severed from the other charges and two trials occurred. At the misdemeanor and witness tampering trial, the jury was instructed on the three statutory alternative means for witness tampering, while Timothy had only been charged under two. He appeals his conviction claiming that the jury instruction was improper. In addition, Timothy contends that his right to confrontation was violated during the trial for felony violation of a no-contact order because the trial court admitted a recording of the 911 call placed by Bridgette immediately after the alleged incident occurred. Bridgette was unavailable to testify and the trial court admitted the recording as an excited

utterance under Evidence Rule (ER) 803(a)(2). We affirm the felony no-contact violation, but reverse the witness tampering conviction and remand for a new trial.

FACTS

Timothy and Bridgette Pugh are married.[1] In November 2004, Bridgette received a protection order against Timothy issued by the SeaTac Municipal Court. In the early hours of March 31, 2005, Bridgette called 911 stating "My husband was beating me up really bad." She reported pain in her face and requested an ambulance. When the police arrived, Bridgette had a bruised face and chipped tooth. The police quickly arrested Timothy in the parking lot outside the apartment. Because he allegedly assaulted Bridgette while she was under a protection order, he was charged with one count of domestic violence felony violation of a court order. Following his arrest, Timothy made several phone calls from the King County Jail to his wife in further violation of the court order. He was charged with two misdemeanor violations as a result of the calls. In addition, the telephone calls were monitored and recorded by the jail. The State obtained a copy of the calls and charged Timothy with an additional count of witness tampering because he allegedly induced his wife to testify falsely or withhold testimony or absent herself from the proceedings against him.

The trial court granted the defense motion to sever the felony no-contact order violation from the other counts. The misdemeanor and witness tampering

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[1] For the sake of clarity and when necessary, we refer to Timothy and Bridgette by their first names. We intend no disrespect by doing so.

trial was held first, and Timothy was convicted of those three counts. The State served a subpoena on Bridgette but she failed to appear at either trial. The State could not locate her to compel her testimony. At the felony no-contact violation trial, the court admitted a recording of Bridgette's 911 phone call as an excited utterance under ER 803(a)(2). Timothy was convicted on this count as well.

ANALYSIS

I. Witness Tampering

A defendant cannot be tried for an uncharged offense. State v. Brown, 45 Wn. App. 571, 576, 726 P.2d 60 (1986). "The manner of committing a crime is an element and the defendant must be informed of this element in the information in order to prepare a proper defense." State v. Bray, 52 Wn. App. 30, 34, 756 P.2d 1332 (1988). When a statute includes alternative means for the commission of a crime, the State may charge the defendant on one or multiple alternatives as long as they are not repugnant to each other. State v. Severns, 13 Wn.2d 542, 548, 125 P.2d 659 (1942). While the information need not charge all the means available in a statute, "[i]t is reversible error to try a defendant under an uncharged statutory alternative because it violates the defendant's right to notice of the crime charged." State v. Doogan, 82 Wn. App. 185, 188, 917 P.2d 155 (1996). Instructional error is presumed prejudicial unless it affirmatively appears that the error was harmless. State v. Stein, 144 Wn.2d 236, 246, 27 P.3d 184 (2001). "The error of offering an uncharged means as a basis for conviction is prejudicial if it is possible that the jury might have convicted the defendant under the uncharged alternative." Doogan, 82 Wn. App. at 189.

Here, the jury received instructions containing all three means of committing witness tampering, even though the information only charged Timothy with two of the alternatives. Timothy argues that this violates his constitutional right to notice of the charges against him. The State correctly notes that the defense raised no exception to the erroneous instruction. However, an error of constitutional magnitude can be raised for the first time on appeal unless the invited error doctrine applies. See, State v. Henderson, 114 Wn.2d 867, 870, 792 P.2d 514 (1990); Doogan, 82 Wn. App. at 188.

The invited error doctrine precludes review of instructions proposed by the defendant. "A party may not request an instruction and later complain on appeal that the requested instruction was given." State v. Boyer, 91 Wn.2d 342, 588 P.2d 1151 (1979). The State contends that invited error applies because the defense adopted the error by failing to object to the jury instruction and arguments on the uncharged method, particularly because the trial court announced that failure to except would be taken as an adoptive admission. However, this construction of the invited error doctrine is not supported by case law. Invited error occurs when the defense proposes the allegedly erroneous instruction. See, e.g., Boyer, 91 Wn.2d at 344-45; State v. Studd, 137 Wn.2d 533, 546-47, 973 P.2d 1049 (1999); Doogan, 82 Wn. App. at 188; Henderson, 114 Wn.2d at 870-71. Timothy did not propose the improper instruction, he merely failed to object. "[F]ailing to except to an instruction does not constitute invited error." State v. Corn, 95 Wn. App. 41, 56, 975 P.2d 520 (1999).

The State proposed the instruction given in this case. The trial court gave an instruction that included an uncharged alternative method and the State argued all three means throughout the trial. As a result, the jury could have convicted under the uncharged means. Since there is no special verdict or other evidence to show the means the jury used to convict Timothy, the error is prejudicial. We reverse the conviction for witness tampering.

II. Sixth Amendment Right to Confrontation

The Sixth Amendment guarantees a defendant the right "to be confronted with the witnesses against him." Timothy contends that this right to confrontation was violated when the State introduced a tape of the 911 call made by Bridgette immediately after the alleged assault. He claims he had no opportunity to cross-examine Bridgette as to the contents of the call because she was unavailable as a witness. The court admitted the evidence as an excited utterance exception to the hearsay rule. ER 803(a)(2).

The analysis of evidence for the purposes of the federal Confrontation Clause was altered dramatically in Crawford v. Washington. 541 U.S. 36, 124 S. Ct. 1354, 158 L. Ed. 2d 177 (2004). The Court shifted the test for admission without confrontation from the indicia of reliability of a statement analysis to a determination of whether a statement is testimonial or non-testimonial in nature. Id. at 59, 68. This categorization of the evidence is critical for purposes of the Confrontation Clause. "Where nontestimonial hearsay is at issue, it is wholly consistent with the Framers' design to afford the States flexibility in their development of hearsay law. . .Where testimonial evidence is at issue, however,

the Sixth Amendment demands what the common law required: unavailability and a prior opportunity for cross-examination." Id. at 68. Where the witness is unavailable and the defendant has not had prior opportunity to cross examine, testimonial hearsay evidence is inadmissible under the Confrontation Clause. The Crawford Court left the nuances of the definition of "testimonial" for another day. Id.

In Davis v. Washington, the Court had the opportunity to determine the nature of a 911 call in a domestic violence situation, similar to the one at issue here. Davis 547 U.S. ___, 126 S. Ct. 2266, 2271, 165 L. Ed. 2d 224 (2006). The Court determined:

> Statements are nontestimonial when made in the course of police interrogation under circumstances objectively indicating that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. They are testimonial when the circumstances objectively indicate that there is no such ongoing emergency, and that the primary purpose of the interrogation is to establish or prove past events potentially relevant to later criminal prosecution.

Id. at 2273-2274. The Court concluded that the 911 call was nontestimonial in nature because the victim was speaking about events as they actually happened, a reasonable listener would recognize that the victim was facing an ongoing emergency, the environment was chaotic and probably unsafe, and the call was a cry for help in the face of a real physical threat. Id. at 2276-77. "[T]he circumstances of [the] interrogation objectively indicate its primary purpose was to enable police assistance to meet an ongoing emergency." Id. at 2277. In contrast, the companion case found that statements made to police shortly after an incident were testimonial because "[o]bjectively viewed, the primary, if not the

sole, purpose of the interrogation was to investigate a possible crime." Id. at 2278. According to the Court, there was no immediate threat and no emergency in progress, and the witness testified as to "what happened" instead of "what is happening." Id.

Timothy attempts to characterize the 911 call as testimonial because it recounts events that just happened and Bridgette was out of danger because her husband had left the premises. Bridgette's 911 call does begin with a statement about what had already happened. "My husband was beating me up really bad." She does tell the operator that her husband is walking away. She does not however say he is far away and that he is no longer a threat. This court has previously found that a 911 statement after an event was still nontestimonial if it indicated an ongoing emergency. State v. Williams, 136 Wn. App. 486, 503-04, 150 P.3d 111 (2007). "The call was made very shortly after the incident took place. Moreover, many of [the witness'] statements during the call clearly demonstrated that her over-riding purpose for calling 911 was to secure police assistance to ensure her safety." Id. For example, Bridgette said she needed medical assistance and requested that the operator send an ambulance. She also showed concern for her ongoing safety.

> Operator: Can you still see him from where you are?
> [Bridgette] Pugh: I'm not gonna. . .you want me to go outside so he can beat me up so [sic] more?
> Operator: What?
> [Bridgette] Pugh: Do you want me to go out there and see him so he can beat me up some more?

Her concern about another beating if she encountered Timothy reflected that she thought he may still be close by, and clearly felt that he remained a danger to

her. These factors, combined with the chaos and fear of the situation, demonstrate that the statements were made to gain help and resolve the emergency.

In addition, the questions asked by the operator "were designed to gather information necessary to enable the police to respond to the emergency situation." Williams, 136 Wn. App. at 503. The operator asked questions about Timothy's appearance, his location, whether he was alone, if he was armed and if he had been drinking. Answers to these questions would provide police officers with valuable information needed to safely resolve a potentially dangerous domestic violence situation. They were "to enable police assistance to meet an ongoing emergency, rather than to establish or prove past events, potentially relevant to later criminal proceedings." Id. at 504. As a result, the 911 call was non-testimonial. Admission of the tape as an excited utterance in light of Bridgette's unavailability did not violate Timothy's right to confrontation.

III. Right to Confrontation under Article I, Section 22

Article I, section 22 of the Washington State Constitution states that "[i]n criminal prosecutions the accused shall have the right. . .to meet the witnesses against him face to face." Timothy argues that this clause provides broader protection than the Sixth Amendment. As such, he contends that unless the proponent affirmatively shows the unavailability of the declarant, admitting hearsay statements under the excited utterance exception violates a defendant's right to confrontation. This would effectively change the excited utterance from

an ER 803 hearsay exception, where the availability of the declarant is immaterial, to an ER 804 exception, where the declarant must be unavailable.

Because the Washington Supreme Court has yet to conclusively determine whether article I, section 22 generally provides greater confrontation rights in the context of the excited utterance hearsay exception, a Gunwall analysis[2] is required. See, State v. Mason, 127 Wn. App. 554, 126 P.3d 34 (2005), aff'd 2007 Wash. LEXIS 553, ___ P.3d ___ (Gunwall required where court has not yet decided whether article I, section 22 provides greater protection in a situation). This court has previously declined to address similar challenges where the Gunwall analysis was insufficient. See, State v. Saunders, 132 Wn. App. 592, 606-07, 132 P.3d 743 (2006), review denied, 159 Wn.2d 1017 (2007); State v. Mohamed, 132 Wn. App. 58, 69, 130 P.3d 401 (2006), review denied, 149 P.3d 379 (2006). In this case, Timothy has provided an examination of all the Gunwall factors in support of his contention. Despite this effort, the Gunwall analysis fails to show broader protections in this context. Examining pre-existing state law shows that early courts would have admitted excited utterances even when the witness was not shown to be unavailable.

Timothy argues that the excited utterance exception was an unknown at the passage of the state constitution and that "preexisting Washington law demonstrates that a trial by hearsay admitted under the excited utterance

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[2] "The following nonexclusive neutral criteria are relevant in determining whether, in a given situation, the Washington State Constitution should be considered as extending broader rights to its citizens than the United States Constitution: (1) the textual language; (2) differences in the texts; (3) constitutional history; (4) preexisting state law; (5) structural differences; and (6) matters of particular state or local concern." State v. Gunwall, 106 Wn.2d 54, 58, 720 P.2d 808 (1986).

exception would offend the framers' purpose in providing face to face confrontation for criminal defendants." However, while the excited utterance exception, as it exists today, may not have existed at the framing of the state constitution, it evolved from the longstanding res gestae exception.

Res gestae "is a doctrine which recognizes that, under certain circumstances, a declaration may be of such spontaneous utterance that, metaphorically, it is an event speaking through the person, as distinguished from a person merely narrating the details of an event." Beck v. Dye, 200 Wash. 1, 10-11, 92 P.2d 1113 (1939). This exception can be seen in use early on in state judicial history. See, e.g., State v. Freidrich, 4 Wash. 204, 214, 29 P. 1055 (1892) (res gestae is a general rule of evidence); Bothell v. Seattle, 17 Wash. 263, 264, 49 P. 491 (1897) (testimony of witness about respondent's exclamations of pain and suffering was competent and material); State v. Smith, 26 Wash. 354, 357, 67 P. 70 (1901) ("Declarations of the person robbed, when of the res gestae, are admissible in evidence."); Spokane & Vancouver Gold & Copper Co. v. Colfelt, 24 Wash. 568, 571, 64 P. 847 (1901) ("Hearsay evidence, to be admissible as part of the res gestae, must relate to the transaction in dispute, and must be so closely related to it as to serve to explain the transaction itself").

As early as 1902, evidence admitted under the res gestae exception could have an explanatory character. "[S]uch declarations are admitted, although not technically contemporaneous, if they are spontaneous and tend to explain the transaction, and if so slight an interval of time has elapsed as to render

premeditation improbable." Roberts v. Port Blakely Mill Co., 30 Wash. 25, 32, 70 P. 111 (1902). In contrast, when a hearsay statement was "not the utterance of instinctive words," early Washington courts held it inadmissible. State v. Aldrick, 97 Wash. 593, 596, 166 P. 1130 (1917). This was the case in Aldrick, where an alleged rape victim's narration of the events to her father, then hours after the rape, was held inadmissible because it was not res gestae. Id. at 593, 596. Timothy's characterization of Aldrick, which he relies on to argue that the framer's intended face-to-face confrontation, ignores the reasoning behind the court's decision.

The Beck Court defined the res gestae exception in its modern incarnation, acknowledging that this type of testimony was not a new creation. "This court has had frequent occasion in the past to consider the so-called res gestae rule with respect to the admission of testimony concerning statements made by participants in a transaction or by other persons present thereat." Beck, 200 Wash. at 9. The court laid out the rule, gleaned from examination of the "numerous" cases. Id.

> (1) The statement or declaration made must relate to the main event and must explain, elucidate, or in some way characterize that event; (2) it must be a natural declaration or statement growing out of the event, and not a mere narrative of a past, completed affair; (3) it must be a statement of fact, and not the mere expression of an opinion; (4) it must be a spontaneous or instinctive utterance of thought, dominated or evoked by the transaction or occurrence itself, and not the product of premeditation, reflection, or design; (5) while the declaration or statement need not be coincident or contemporaneous with the occurrence of the event, it must be made at such time and under such circumstances as will exclude the presumption that it is the result of deliberation, and (6) it must appear that the declaration or statement was made by one who

> either participated in the transaction or witnessed the act or fact concerning which the declaration or statement was made.

Id. at 9-10. In Beck, the Court excluded police testimony about statements of unknown witnesses about the cause of a car accident, but only because no evidence showed that the declarants witnessed or participated in the accident. If the evidence had shown that they had witnessed or participated, their comments about the cause of the accident would have been admissible under res gestae. The rationale behind admission is that such statements, "raise a reasonable presumption that they are the spontaneous utterances of thoughts created by or springing out of the transaction itself, and so soon thereafter as to exclude the presumption that they are the result of premeditation or design." Heg v. Mullen, 115 Wash. 252, 256, 197 P. 51 (1921) (quoting 10 R.C.L. 974). Cross-examination is unnecessary when the action speaks for itself.

In early cases, the hearsay testimony was admitted where the declarant was unavailable due to insanity or death. In Smith, when the testimony of the victim of a robbery was eliminated due to incompetence, the Court admitted evidence under res gestae exception because "[t]he statement of the person alleged to have been robbed was made almost immediately after the time of the alleged offense. Declarations of the person robbed, when of the res gestae, are admissible in evidence." Smith, 26 Wash. at 357. A witness was also able to testify to comments made by her dead sister under the res gestae exception. State v. Hazzard, 75 Wash. 5, 23, 134 P. 514 (1913). In this case, the declarant was unavailable due to death. However, the court makes no specific findings as to the declarants' unavailability in either case. While these cases do not refute

Timothy's contention that the declarant must be shown to be unavailable, neither do they affirm his argument because the court did not require such a showing.

Other cases cited make no specific mention of the availability of a witness when admitting res gestae evidence. See, Beck, 200 Wash. at 8-10, (police officer reported exclamation of unknown bystander to an accident); Walters v. Spokane Int'l Ry. Co., 58 Wash. 293, 297, 108 P. 593 (1910) (statement of conductor to a person arriving to help after a train accident was admissible; court makes no mention of conductor's testimony or availability); Thus, there is truth to the State's proclamation that "[n]owhere in early Washington case law is it required that the declarant be unavailable to testify or that the trial court need determine the declarant's unavailability." This is consistent with the rationale behind res gestae, and excited utterance by extension.

> What is said or done by participants under the immediate spur of a transaction becomes thus part of the transaction, because it is then the transaction that thus speaks. In such cases it is not necessary to examine as witnesses the persons who, as participators in the transaction, thus instinctively spoke or acted.

Aldrick, 97 Wash. at 596.

This rationale persists today for admission under the excited utterance exception. State v. Brown, 127 Wn.2d 749, 758, 903 P.2d 459 (1995). As seen above, spontaneous declarations made immediately after a traumatic event have long been considered reliable without cross-examination. Pre-existing Washington law does not support Timothy's contention that article I, section 22 requires confrontation or a showing of unavailability to admit excited utterance testimony. We need not address the additional Gunwall factors. The protections

of the State Confrontation Clause mirror those guaranteed by the federal constitution in this respect. The 911 call was admissible under ER 803(a)(2).

IV. Statement of Additional Grounds

Timothy makes several arguments in his statement of additional grounds. Most of the additional grounds alleged by Timothy merely repeat the contentions of his attorney. However, he raises two evidentiary issues that differ.

A. Note From Bridgette Pugh

Timothy states that "[m]y trial lawyer either forgot to or was unable to place in evidence a handwritten note written by [Bridgette] that would have exonerated me." In the note, Bridgette admits that she fabricated the incident because she was angry about her husband's infidelity. The record shows that the trial court allowed admission of the letter under ER 806, but the court also ruled that admission of the letter opened the door to State evidence impeaching the recantation and supporting the initial report of the incident. Timothy's defense attorney then decided against admitting the letter in order to prevent admission of rebuttal evidence that was otherwise inadmissible. As a result, the trial court did not improperly refuse to admit the evidence. The trial attorney made a strategic decision not to use the letter. "[T]he choice of trial tactics, the action to be taken or avoided, and the methodology to be employed must rest in the attorney's judgment." State v. Piche, 71 Wn.2d 583, 590, 430 P.2d 522 (1967). The failure to admit Bridgette's letter was not an error of law.

B. Bridgette's Prior Convictions and History of Drug Use

Timothy also contends that "prior criminal conduct by [Bridgette] both for prostitution and known drug abuse was not produced in court for the jury to hear." The defense attorney told the court "we are not seeking to admit the history of convictions for prostitution or drug use, or a history of prostitution or drug use." This is also a trial strategy left to defense counsel. Id. There is no error requiring review.

We affirm Timothy's conviction for felony violation of the no-contact order, but reverse the witness tampering conviction and remand for a new trial.

Appelwick, C.J.

WE CONCUR:

Dwyer, J. Grosse, J.

DECLARATION OF MAILING OR DELIVERY

The undersigned certifies under penalty of perjury under the laws of the State of Washington that on the below date, a true copy of the document filed under **Court of Appeals No. 56935-0-I** (for transmittal to the Supreme Court) to which this declaration is affixed/attached, was mailed or caused to be delivered to each attorney or party or record for ☒ respondent: **James Whisman - King County Prosecuting Attorney**, ☒ appellant and/or ☐ other party, at the regular office or residence or drop-off box at the prosecutor's office.

MARIA ARRANZA RILEY, Legal Assistant
Washington Appellate Project

Date: October 25, 2007